DARINSOK PANGIRAN APAN & ORS A

v.

HAP SENG CONSOLIDATED BHD & ORS

HIGH COURT SABAH & SARAWAK, SANDAKAN B
YEW JEN KIE JC
[CIVIL SUIT NO: K22-245-2002]
21 JULY 2008

LAND LAW: *Customary land - Native customary rights in Sabah - No automatic conferment of native customary rights on occupiers of lands subject to such rights - Claim for native customary rights to be heard and determined by Collector - Native customary rights governed by Sabah Land Ordinance - No need for applicants to resort to common law to establish their proprietary rights - Discretion of Collector to award money compensation instead of issuing titles to land where claim is successful* C D

CIVIL PROCEDURE: *Jurisdiction - Native customary rights, claim for - Collector to hear and determine claim for native customary rights even where land has been alienated - Jurisdiction to determining native customary rights vested in Collector by Sabah Land Ordinance - Courts' jurisdiction excluded except on appeal - Court no jurisdiction to hear and determine native customary rights claimed by applicants* E

The 1st defendant applied for a piece of land in the district of Kinabatangan ("the Land") and a letter of offer to alienate the Land was issued to the 1st defendant in February 1997. After payment of the stipulated premium, the final title deed conferring absolute ownership was issued to the 1st defendant on 4 May 1998. The procedure required by s. 13 of the Land Ordinance 1930 was duly complied with. The plaintiffs did not make any statement of claim of native customary rights to the Collector in response to the notice published in accordance with s. 13 following the 1st defendant's application for the Land. Nearly four years after the title deed had been issued to the 1st defendant the plaintiffs applied to the Collector for public inquiry to determine their rights under ss. 13, 14 and 15 of the Land Ordinance. Pending the determination of the Collector, the plaintiffs commenced legal proceedings in court for various reliefs relating to their native customary rights. The 1st defendant raised the preliminary objection that the legal proceedings should be dismissed and discontinued for want of jurisdiction. In essence, the objection was whether the court has original jurisdiction to hear a claim for native customary rights. The defendants contended that: (i) even if the plaintiffs were in occupation of the Land at the time the title was issued to the 1st defendant, which they denied, they must submit their claims for their native customary rights to the F G H I

A Collector for determination; and (ii) as their native customary rights were yet to be determined by the Collector, the plaintiffs' action must be struck out because they were seeking declarations on their native customary rights in respect of which the court's jurisdiction was excluded by s. 41 of the Land Ordinance. The plaintiffs contended that
B they were claiming their proprietary right in the Land based on their right at common law, statutory law and under the Federal Constitution.

Held (allowing the preliminary objection with costs to the defendants):

C **(1)** Land laws in Sabah have always recognized native customary rights and laid down procedures by which such claims can be asserted, determined and protected. There is no automatic conferment of native customary rights on occupiers of lands subject to such rights. (para 32)

D **(2)** Even if the land had ceased to be state land in that it had been alienated, there was nothing to stop the Collector from hearing and determining the claim for native customary rights and if such claim was successfully established, he still had the discretion to award money compensation instead of issuing titles to the land. (para 46)

E **(3)** Given that there was an Enactment in the form of Land Ordinance in Sabah governing what constitutes NCR and the procedure of such claims being made and determined, there was no need for the plaintiffs to resort to the common law to establish their proprietary
F rights in the Land. (para 49)

(4) In view of ss. 13, 14, 15, 16 and 40 of the Land Ordinance which expressly vested the jurisdiction in determining native customary rights in the Collector and excluded court jurisdiction except on appeal, the court had no jurisdiction to hear the present claim which
G called upon the court to determine the native customary rights claimed by the plaintiff. (para 70)

(5) Even though the plaintiffs had failed to file their statement of claim of native customary rights pursuant to the section 13 notice issued
H by the Collector, there was nothing to stop the Collector from hearing the plaintiff's claim and in the event the plaintiffs successfully established their native customary rights, the Collector could award compensation since the Land had already been alienated to the 1st defendant. (para 70)

I

Case(s) referred to:
Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor [1997] 3 CLJ 885 HC ***(refd)***
Burhan Ating & Ors v. Directors of Lands and Surveys & Ors [1992] 2 CLJ 1203; [1992] 2 CLJ (Rep) 211 HC ***(refd)***
Kerajaan Negeri Johor & Anor v. Adong Kuwau & Ors [1998] 2 CLJ 665 FC ***(refd)***
Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors [2001] 2 CLJ 769 ***(refd)***
Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors [2002] 2 CLJ 543 HC ***(refd)***
Superintendent Of Land & Surveys Miri Division & Anor v. Madeli Salleh [2007] 6 CLJ 509 FC ***(refd)***

Legislation referred to:
Aboriginal Peoples Act 1954, s. 11
Federal Constitution, arts. 5, 8, 13(1), (2)
Land Code (Cap 81) (Sarawak), s. 15
Land Ordinance (Cap 68) (Sabah), ss. 4, 9, 12, 13, 14, 15, 16, 40, 41(2), 65, 66, 69, 84
Rules of High Court 1980, O. 18 r. 19(1)

For the plaintiffs - Datuk Kong Hong Ming; M/s Lee & Kong
For the 1st defendant - Lim Yee Poh; M/s Shim Pang & Co
For the 2nd & 3rd defendants - Michael Denis Tan; M/s Michael Denis Tan & Co

Reported by Amutha Suppayah

JUDGMENT

Yew Jen Kie JC:

Grounds Of Decision On Preliminary Objection

[1] The matter before me is preliminary objection raised by the defendants. In essence, the objection is whether the court has original jurisdiction to hear a claim for native customary rights.

Factual Background

[2] The undisputed facts are as follows: Some time in 1997, the 1st defendant applied for a piece of land measuring 25,000 acres in the district of Kinabatangan ("the Land") and a letter of offer to alienate the Land was issued to the 1st defendant in February 1997. After payment of the stipulated premium, the final title deed conferring absolute ownership was issued to the 1st defendant on 4 May 1998 pursuant to the land application over a land area reduced to 21,819 acres. The Assistant Collector of Land Revenue, Kinabatangan, has then confirmed

A in a letter dated 26 July 2002 that the usual procedure required by s. 13 of the Land Ordinance was duly complied with. This was not disputed by the plaintiffs. On 3 May 2002, the 4th defendant issued a permission to transfer ownership of the Land to the 3rd defendant. It is to be noted that there was no mention of native customary rights in the B letter of offer or the title deed. Nor did the permission to transfer of ownership of the land to the 3rd defendant state that the transfer is to subject to any native customary rights.

[3] The plaintiffs did not make any statement of claim of native customary rights to the Collector in response to the notice published in C accordance with s. 13 following the 1st defendant's application for the Land. Nearly four years after the title deed had been issued to the 1st defendant the plaintiffs applied by a letter dated 13 January 2002 to the Collector, Kinabatangan for public inquiry to determine their rights under ss. 13, 14 and 15 of the Land Ordinance

D

[4] Pending the determination of the Collector, the plaintiffs commenced legal proceedings in this court for various reliefs relating to their native customary rights. It is because of this multiplicity of actions that the 1st defendant is now raising the preliminary objection that the E legal proceedings should be dismissed and discontinued for want of jurisdiction.

[5] In essence, the contentions advanced for all the defendants are that s. 9 of the Land Ordinance empowers the Director of Lands and Surveys to alienate the state land. Section 13 of the same Ordinance F provides that upon receipt of any application for unalienated country land, the assistant Collector of land revenue ("the Collector") shall publish a notice calling for any claimants to native customary rights to make a claim within a specified period as had been done in this case.

G **[6]** Pursuant to s. 14 of the Land Ordinance, all claims to native customary rights, which rights are defined in ss. 15 and 65 of the Land Ordinance, are to be decided by the Collector. Even if the claim to native customary rights is established, the Collector still has a discretion, under s. 16 of the Land Ordinance, whether to pay monetary compensation or to issue a title to the claimant. Anyone dissatisfied with H the decision or order of the Collector can appeal to the director of Lands and Surveys and from the decision or order of the director, to the High Court.

[7] Section 41(2) of the Land Ordinance provides that the court is I not to exercise original jurisdiction as to any claim or question in respect of which jurisdiction is given by the Land Ordinance to a Collector or the director.

[8] It is the defendants' contention that even if the plaintiffs were in occupation of the Land at the time the title was issued to the 1st defendant, which they denied, they must submit their claims for their native customary rights to the Collector for determination. As their native customary rights are yet to be determined by the Collector, the plaintiffs' present action must be struck out because they are seeking declarations on their native customary rights in respect of which this court's jurisdiction is excluded by s. 41 of the Land Ordinance.

[9] The plaintiffs submitted that the present preliminary objection in respect of the jurisdiction is *res judicata* and ought to be dismissed. This is because there were two earlier Summonses in Chambers by the 1st, 2nd and 3rd defendants dated 11 February 2003 and 26 February 2003 respectively to strike out the plaintiffs' claim under O. 18 r. 19(1) of the Rules of High Court 1980. One of the main grounds to strike out the plaintiffs' claim was that this court has no jurisdiction to hear the plaintiffs' claim for native customary rights on the same grounds as raised in the present preliminary objection.

[10] On 13 June 2003, the learned deputy registrar dismissed both summonses in chambers and the appeal against those decisions had been filed and are still pending.

[11] Given that the learned deputy registrar had adjudicated upon the jurisdictional issue, the defendants should not be allowed to raise or re-litigate the same preliminary issues before this court.

[12] For the plaintiffs, it is contended that the plaintiffs are claiming their proprietary right in the Land based on their right at common law, statutory law and under the Federal Constitution.

[13] It submitted that the common law recognized a form of native titles which reflects the entitlement of the native in accordance with their laws and custom to their traditional land. To support the contention, reliance was placed on *Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor* [1997] 3 CLJ 885.

[14] It was further submitted that the term "Native Title" describes the interests and rights of the indigenous inhabitants in the land whether communal, group or individual, possessed under their traditions and customs, citing [1991-1991] 175 CLR [Mabo No. 2] which had been referred to by the Malaysia courts in *Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors* [2002] 2 CLJ 543 and *Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor* [1997] 3 CLJ 885.

[15] It was submitted that the plaintiffs and the native community have been in lawful occupation and peaceful possession of the native customary rights Land they are claiming for generations since time immemorial. They have resided and cultivated on the native customary rights Land for sustenance and livelihood since time immemorial. By this suit they are claiming for themselves and on behalf of the native community in Tongod Region all the rights to usufructuary interest in the native customary rights Land which belong to them individually according to their laws and customs.

[16] It was further submitted that common law recognizes native rights and interest over their customary land citing the majority judgment of Lord Denning in the Privy Council decision of [1957] 1 WLR 876, which states:

> In inquiring ... what rights are recognized, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it: and the courts will declare the inhabitants entitled to compensation according to their interest, even though those interest are a kind unknown to English law.

[17] The above majority judgment was referred to in *Mabo No. 2*, *supra* which, the plaintiffs submitted, was approved and adopted by the Malaysia courts in *Adong*'s case, *supra*, which was upheld in toto by the Court of Appeal in *Kerajaan Negeri Johor & Anor v. Adong Kuwau & Ors* [1998] 2 CLJ 665.

[18] In *supra*, it was submitted by the plaintiffs, the High Court recognized that the common law rights of Orang Asli over their ancestral land was a proprietary right which had not been extinguished by any statutory law. In short, it affirmed that aboriginal land rights could co-exist with the statutory law in Malaysia.

[19] Reliance is also placed on *Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 2 CLJ 769, which held that the proprietary interest of the Orang Asli in their customary and ancestral lands is an interest in and to the land, and, that the common law recognizes a form of native title which reflects the entitlement of the aboriginal people, in accordance with their laws and customs, to their traditional lands. It reiterates the main feature of native titles, including that it is a right enforceable by the courts.

[20] Reliance is also placed on the recent Federal Court's case of *Superintendent Of Land & Surveys Miri Division & Anor v. Madeli Salleh* [2007] 6 CLJ 509, which held, among others; a statute should not have the effect of extinguishing the right of the natives over such land, which had been in existence prior to the coming into force of the said statute. Such a drastic measure needs to be expressed in clear language and cannot be derived by mere implication.

[21] Plaintiffs further submitted that pursuant to ss. 65 and 66 of the Land Ordinance, customary tenure means "lawful possession of land by natives either by continuous occupation or cultivation for three or more consecutive years" and "shall confer a permanent heritable and transferable right of use and occupation."

[22] It is the plaintiffs' contention that the issue whether the Land Ordinance has excluded the common law land rights is a triable issue to be determined by the court.

[23] Section 4 of the Land Ordinance defines "state land" as "all lands which have not been ... may not be ... lawfully occupied by any person..." By reason that the plaintiffs and their ancestors have acquired customary and proprietary rights in and over the native customary rights Land (now forming part of the Country Lease) via lawful occupation thereon before the formation of the first colonial Government and before the coming into effect of the Land Ordinance, the Land in question is not state land. As such, contended the plaintiffs, the 4th defendant has no power to alienate the land that has been lawfully occupied. Nor has the Collector any jurisdiction over the alienated land. Sections 13, 9 and 41 of the Land Ordinance are accordingly not applicable to the plaintiffs' case.

[24] Under the statutory law, the plaintiffs submitted that they are claiming their protection and rights under the Land Ordinance and the Federal Constitution. It is the plaintiffs' submission that as the servant of the Government and as the Government itself, the 4th and 5th defendants owe fiduciary duties towards the plaintiffs to protect their welfare and their lands as they were holding the native customary rights as trustees for the plaintiff and the native community.

[25] Under the Federal Constitution, the plaintiffs submitted that the conduct of the 4th and 5th defendants in. taking the land away from the native community violates art. 8 of the Federal Constitution in that there is discrimination in terms of process and compensation as between the acquisition of the native customary land and acquisition falling under the Land Acquisition Ordinance.

[26] It is further contended that the conduct of the 4th and 5th defendants in taking away their land without compensation offends art. 13 of the Federal Constitution. Likewise, the taking of the land which has been the source of sustenance and livelihood of the native community violates art. 5 of the Federal Constitution.

[27] It was submitted that it is plain and obvious that neither the Collector nor the director has any jurisdiction under the Land Ordinance to hear the plaintiff's claim which is founded on common law rights, the Statutory Law and the Federal Constitution.

[28] In short, the issue in this preliminary objection raised by the defendants is whether the court has the jurisdiction to hear the plaintiffs' claim in the light of the provisions in ss. 14 to 16, 41 and 69 of the Land Ordinance.

[29] In resisting the objection, the plaintiffs are saying that their action is not only based on the Land Ordinance. Given that the Land they are claiming is not state land within the definition of s. 4 of the Land Ordinance and that the Land is an alienated land, neither the Collector nor the Director has any jurisdiction over them, hence they are basing their claim of proprietary right over the Land at common law, the statutory law and the Federal Constitution.

[30] The basis of the plaintiffs' contention that the Land is not State land is that their ancestors and the plaintiffs have been occupying the land for generations since time immemorial even before the Colonial Government or the coming into force of the Land Ordinance. In other words, there has been in existence native customary right over the Land, in contrast to land which had not been lawfully occupied within the definition of s. 4 of the Land Ordinance.

[31] Section 4 of the Ordinance defines the State Land as follows:

> "State Land" means all lands which have not been and may not hereafter be reserved for any public purpose, or which have not been and may not hereafter be leased or granted to or are not and may not hereafter be lawfully occupied by any person, and includes all lands which, at the commencement of this Ordinance, may have become or which hereafter may become forfeited by reason of any breach of the conditions on which the same have been lawfully occupied, or which have been or may hereafter be surrendered to the Government by the lawful owner thereof.

[32] It is to be noted that the land laws in Sabah have always recognized native customary rights and laid down procedures by which such claims can be asserted, determined and protected. In other words,

there is no automatic conferment of native customary rights on occupiers of lands subject to such rights. This can be clearly seen from the legislations which preceded the Land Ordinance as well as the Land Ordinance itself.

[33] In Sabah, the first law directed specifically to Native affairs was Proclamation No. III of 1889 subtitled "For the Protection of Native Rights to Land". The Proclamation is administrative in tone and concerned itself with establishing a system of land registration. The preamble and the relevant provisions read:

> When application for Government waste Lands are received and before the issue of the Title Deeds, the following rules are to be observed for the protection of Native Rights.
>
> 1) As soon as the boundaries of the land have been defined, it shall be the duty of the District Officer to inform the nearest native chiefs of the application, and to explain to them that all native claims upon the land must be declared to the District Officer in person, or by letter within a period to be notified from time to time.
>
> 2) ...
>
> 3) ...
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> 4) A written statement of all native claims should be forwarded by the District Officer as soon as possible to the Government Secretary giving the names of each claimant and the nature of his demand.
>
> 5) (Defined what were Native rights)
>
> 6) Native Rights are in all cases to be settled either by (a) a Reservation for land ... or; (b) by money Compensation ...
>
> 7) On the expiration of the time fixed for reporting native claims, the District Officer shall submit to the Government Secretary either (a) a Schedule of all native claims with a certificate ... or; (b) a certificate that no such claims were reported or known to exist on the date fixed in the notice issued under paragraph: and no lease shall be granted until such Schedule or certificate has been received in the Land Office.

[34] By the definition of s. 5 above, native rights in land was constituted by (a) land under cultivation or land used for housing (b) land planted with fruit trees at the rate of twenty or more per acre, (c) isolated fruit trees if enclosed by a fence, (d) grazing land stocked with animals, (e) wet and dry padi land so long as it was cultivated for at least three years prior to cultivation, (f) burial grounds and (g) rights of way.

[35] Proclamation IX, of 1902 subtitled "A proclamation to gradually abolish the Poll-Tax and to establish a system of Land Tenure by Natives". Under the heading Native Land Tenure, ss. 4 and 6 state:

> 4.(i) In order to confirm Natives in their present holdings and to encourage them to take up land for permanent methods of cultivation there shall he issued upon application to every native owner of land a certificate of tenure in perpetuity.
>
> (ii) Application shall be made to the District Officer of Land Office and shall be dealt with without delay and as far as possible in the order in which they are received.
>
> 6. Every certificate of tenure shall be registered in the Land Office and shall confer upon the holder thereof a permanent heritable and transferable right of use and occupancy in his land subject only:
>
> (a) ...

[36] Notification 100 of 1902 which were rules made by the Governor for regulating Native Land Tenure under Section 7 of Proclamation No. ix 1902. Section 1 thereof provides that a Register shall be kept of every Native holding in each district. Section 5 states:

> No claim to or interest in any land shall be valid unless it has been registered in the Land Office of the District in which the land is situate in the manner hereinafter described.

[37] Ordinance 7 of 1913 is entitled "Land Laws". Its definition of State land, Native rights and establishment of Native rights contained in ss. 25, 26 and 27 were as per in Proclamation 1889. Section 31 (i) provides, among others, that an appeal lies from any order or decision of a Collector given under this Ordinance to the Commissioner, and again from any order or decision of the Commissioner, whether original or on appeal, to the court. Subsection (ii) thereof states:

> Except as herein expressly provided, no Court shall exercise jurisdiction as to any claim or question in respect of which jurisdiction is given by this Ordinance to the Collector or the Commissioner.

[38] The following main features are observed from the above legislations in force before the Land Ordinance 1930. (1) The Colonial Government recognized the native rights; such rights however were not conferred upon them automatically as they had to apply for "Government waste land"; (2) the determination of such claims were vested in the Collector and the court's jurisdiction was confined to appeal; (3) the successful claimant would be entitled to a certificate of tenure which conferred on him a "permanent and hereditable rights of use and

occupancy" or monetary compensation was awarded; (4) no claim to or interest in land was valid until it was registered and (5) the land over which native customary rights had been exercised was the property of the State ie, Government waste land.

[39] Mr M.B. Hooker of University of Kent, Canterbury also expressed the view that the land was the property of the state. In his article entitled "The Administration of Native Law in Sabah: An Outline History" published by the Sabah Government in 1973, he wrote with reference to the Proclamation 1889, thus: "It was clearly understood that land was the property of the State..." (see p. xii).

[40] In the light of the above, the plaintiffs' claim that lands over which there were native customary rights clearly cannot hold water.

[41] The situation remains practically the same even after the coming into force of the Land Ordinance 1930 which repealed the Land Ordinance 1930 which repealed the earlier Land Ordinance of 1901 and 1913. The current Ordinance deals with native land in details. Its s. 4 defines State land and native customary rights in the same terms as in the Land Proclamation of 1889. Section 4 defines "Alienate" to mean "... lease, or otherwise dispose of State Land on behalf of the Government ..." for such rennet and premium as may be required.

Section 9 gives the Director of Land and Survey a general power to alienate land.

Section 12 provides that applications for State land are to be made to the director or the Collector substantially in the form of Schedule III.

Section 13 states:

> 13. Upon the receipt of any application for unalienated country land It shall be the duty of the Collector to publish a notice calling upon any claimant to native customary rights in such land who is not yet in possession of a registered documentary title to make or send in a statement of his claim within a date to he specified in the notice. If no claim is made the land shall be dealt with as if no such rights existed.

Section 14 provides that claims to native customary rights shall be taken down in writing by the headman or by the Collector, and shall be decided by the Collector.

Section 15 states:

> Native customary rights shall be held to be:
>
> a) Land possessed by customary tenure,

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b) Land planted with fruit trees, when the number of fruit trees amounts to twenty and upwards to each acre;

c) Isolated fruit trees, and sago, rotan, or other plants of economic value, that the claimant can prove to the satisfaction of the Collector were planted or upkept and regularly enjoyed by him as his personal property;

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d) Grazing land that the claimant agrees to keep stocked with a sufficient number of cattle or horses to keep down the undergrowth;

C

e) Land that has been cultivated or built on within three years;

f) Burial grounds or shrines;

g) Usual rights of way for men or animals from rivers, roads, or houses to any or all of the above.

D

Section 16 states:

Native customary rights established under section 15 shall be dealt with either by money compensation or by a grant of the land to the claimant and in the latter case a title shall be issued under Part IV

E

Section 41 states:

(1) An appeal shall lie from any order or decision of a Collector, Settlement Officer, Surveyor or Registrar given under this Ordinance to the Director, and again from any order or decision of the Director, whether original or an appeal, to the Court.

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Provided that no appeal shall be admitted:

a) After the expiration of thirty days or, where any of the parties are resident outside Sabah, ninety days, from the date of the order or decision appealed against;

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b) Until the prescribed fees shall have been paid;

c) If it is expressly provided that the order or decision shall be final or if any other form of appeal is prescribed;

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d) From any decision of the director under section 9 of the Ordinance;

e) Except as herein expressly provided, no Courts shall exercise jurisdiction as to any claim or question in respect of which jurisdiction is given by this order to a Collector or the director.

I

Section 65 states:

> 65. "Customary tenure' means the lawful possession of land by natives either by continuous occupation or cultivation for three or more consecutive years or by title under this Part or under the Poll Tax Ordinance*, or Part IV of the Land Ordinance, 1913."

Section 66 states:

> 66. Customary tenure shall confer upon the holder thereunder a permanent heritable and transferable right of use and occupancy in his land subject only, ...

Section 84 states:

> 84. All land which has not been claimed or the claim to which has been rejected shall become absolutely the property of Government:
>
> provided that if a claim has been rejected by the Collector the claimant may lodge an appeal to the Director in accordance with the provisions of section 41

[42] Section 84 of the Land Ordinance thus clearly provides that all land which has not been claimed or where the claim has been rejected shall become absolutely the property of Government. It is undisputed fact that no claim to native customary rights had been received subsequent to the notice published pursuant to s. 13 of the Land Ordinance, What this shows is that the Land was State land which is the property of the Government.

[43] As stated earlier, the plaintiff submitted that under the Ordinance native customary rights can only be established on State Land. Given that the native customary rights to Land claimed by the plaintiffs has become alienated land with issue of title, *albeit* wrongfully and constitutionally, neither the Collector nor the Director has any jurisdiction to determine the native customary rights over the Land claimed by the plaintiffs and the plaintiffs' pending application to the Collector for a land inquiry over the native customary rights to Land has also become redundant and irrelevant.

[44] For this reason, the plaintiffs are asserting their proprietary right over the Land under the common law citing the following authorities for support:

1) *Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor* [1997] 3 CLJ 885;

2) *Burhan Ating & Ors v. Directors of Lands and Surveys & Ors* [1992] 2 CLJ 1203; [1992] 2 CLJ (Rep) 211

3) *Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 2 CLJ 769**;**

4) *Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors* [2002] 2 CLJ 543

[45] In the case of *Burhan Ating & Ors v. Directors of Lands and Surveys & Ors* [1992] 2 CLJ 1203; [1992] 2 CLJ (Rep) 211 the plaintiffs claimed to be the customary right owners of 500 acres of land at KM28, Pagagau, Semporna. The 1st defendant was the registered owner of the 5000 acres of land. Ian H.C, Chin J held that the plaintiffs' claim for a declaration that they were entitled to native customary rights over the 5000 acres of land was misconceived and unsustainable. If the plaintiffs want to claim native customary rights, they must apply to the Collector and not to the court which has been excluded by the Land Ordinance from exercising original jurisdiction. Assuming that the plaintiffs could establish native customary rights, the Collector still has the discretion to pay them monetary compensation instead of issuing them titles to the land. There the Collector can still lawfully decide, which he has done in this case, to alienate the land to the 1st defendant even if the plaintiffs are native customary right owners.

[46] From the reading of *supra*, my understanding is that even if the land has ceased to be state land in that it has been alienated, there is nothing to stop the Collector from hearing and determining the claim for native customary rights and if such claim is successfully established, he still has the discretion to award money compensation instead of issuing titles to the land.

[47] With this understanding, I therefore disagree that the Collector has no discretion over the Land now because the Land has been alienated. This is because if the plaintiffs can successfully establish native customary rights, the Collector still has the discretion to award monetary compensation instead of issuing them with titles to the Land.

[48] In my opinion, the plaintiff's reliance on the above cases which effectively held that common law recognizes native rights and interest over their customary land, is misplaced. I say so for the reasons as follows: In Sabah; as stated earlier, the Land Ordinance not only recognizes the native customary rights by providing a wide definition of the rights which are capable of being native customary rights (ss. 15 and 65), it has also established a system by which claims for such rights can be determined (ss. 13, 14, 16 and Part IV under the heading "Native Lands").

[49] Given that there is an Enactment in the form of Land Ordinance in Sabah governing what constitutes NCR and the procedure of such claims being made and determined, it is my considered view that there is no need for the plaintiffs to resort to the common law to establish their proprietary rights in the Land.

[50] Although the Land Ordinance in Sabah gives cognizance to the native customary rights, such rights that might be acquired by lawful occupation are automatically conferred upon the natives. Such rights are to be determined by the Collector who is vested with the jurisdiction under s. 14 of the Land Ordinance, and appeal against the Collector's decision lies to the Director. Section 41(2) expressly bars the courts' jurisdiction in any claims or question in respect of which jurisdiction is given by the Land Ordinance to a Collector or the director.

[51] In *Burhan Ating & Ors v. Directors of Lands and Surveys & Ors* [1992] 2 CLJ 1203; [1992] 2 CLJ (Rep) 211 where Ian Chin J said:

> All claims to native customary rights, which rights are defined in ss. 15 and 65 of the Land Ordinance and which include lawful possession of land by natives either by continuous occupation or cultivation for three or more consecutive years. are to be decided, as provided by s. 14 of the Land Ordinance by the Collector of Land Revenue. Even if the claim to native customary rights is established, the Collector still has a discretion, under s. 16 of the Land Ordinance, whether to pay monetary compensation or to issue a title to the claimant.

[52] In *supra*, Ian Chin J said:

> Clearly the Land Ordinance prohibits the Court from exercising original jurisdiction over claims to native customary rights.
>
> The claim against the defendants for "an order that they are the rightful owners of the said area of 5000 acres at KM28 Pegagau, District of Semporna. under customary rights" is totally misconceived. If their clams to native customary rights have already been established they must have by now been issued with titles. They have not been issued with titles which means they have yet to establish their claim. If they want to claim now, they must apply to the Assistant Collector of Land Revenue and not to Court which has been excluded by the Land Ordinance from exercising original jurisdiction. ...

[53] In *Adong*'s case the plaintiff claimed that the land in question was their traditional and ancestral land and upon which they depended to forage for their livelihood in accordance with their tradition. The defendants had alienated the land to the State Corporation, it was their contention that the rights according to the aboriginal people by common law and statutory law were proprietary rights within the ambit of

art. 13(1) of the Federal Constitution and that when these rights were taken away by the defendant, the plaintiffs should be compensated pursuant to art. 13(2).

[54] In allowing the application, Mokhtar Sidin JCA held, among others, that in Malaysia the aborigines' common law rights include, *inter alia*, the right to live on their land as their forefathers had lived and this would mean that even the future generations of the aboriginal people would be entitled to this right of their forefathers. Section 11 of the Aboriginal Peoples Act 1954 guarantees adequate compensation for land, bearing rubber or fruit trees, claimed by the aboriginal people, that is alienated. The plaintiffs' rights both under common law and statutory law are proprietary rights protected by art. 13 of the Federal Constitution which mandates that all acquisition of proprietary rights shall be compensated. The plaintiffs had established that they have proprietary rights over the area in question and that the defendants had deprived them of these rights. Since the defendants had failed to establish their right to deprive the plaintiffs of their proprietary rights over the area in question, the deprivation without compensation was unlawful. The plaintiffs were entitled to compensation in accordance with art. 13(2).

[55] In my opinion, the reason why the plaintiffs in *Adong*'s case relied heavily on common law principles is because both the National Land Code 1965 which governs the Land law in Semenanjung and the Aboriginal Peoples Act do not clearly spell out the right and the procedures to be adopted when dealing with native land matters. Therefore in order to support their claim, they have to rely upon common law principles which are complementary to the Aboriginal Peoples Act.

[56] In *supra*, the plaintiffs who belonged to the aboriginal Temuan tribe were evicted from land following the acquisition of the land for the purpose of the construction of a portion of the highway to the Kuala Lumpur International Airport. The plaintiffs were compensated for the loss of their crops, fruit trees and loss of their homes but not the value of the land. Hence, the plaintiffs claimed against the defendants for, *inter alia*, adequate compensation as stipulated in the Land Acquisition Act 1960.

[57] Mohd Noor Ahmad J (as he then was) followed *Adong*'s case and held that the common law recognizes a form of native title which reflects the entitlement of the aboriginal people, in accordance with their laws and customs, to their traditional lands. It was further held that the Aboriginal Peoples Act 1954 did not exclude rights vested in the aboriginal people as common law. As the compensation under the

Aboriginal Peoples Act 1954 was not adequate within the meaning of art. 13(2) of the Federal Constitution, it followed, therefore, that the deprivation of the plaintiffs' proprietary rights was unlawful because they were entitled to the compensation in accordance with art. 13(2) of the Federal Constitution.

[58] In *supra*, the compensation under the Aboriginal Peoples Act 1954 was inadequate and the judge held that they should be compensated under the Land Acquisition Act 1960, In contrast. Section 16 of the Land Ordinance gives the discretion to the Collector either to issue the land to the successful claimant of native customary rights or to make compensation, in the present case there is no issue of inadequate compensation because the plaintiffs had never submitted their written statement of claim to the Collector when the Collector issued a notice calling for claims for native customary rights under s. 13 of the Land Ordinance.

[59] Concerning land in Sarawak and in considering the issue of "Whether Rights Were Affected By Any Order or Legislations", the learned judge recognized the principle that native customary rights can be abrogated or otherwise affected by legislation. However after a detailed analysis of the legislation application in Sarawak, he concluded that the original decision by the Rajah of Sarawak to respect native rights was honoured by the Crown when the territory was ceded in 1948. Consequently, he concluded that "if they (the native rights) existed before, they continue to exist." The learned judge also said that the native title in that case could not be extinguished by alienation to a third party under s. 15 of the Sarawak Land Code without hearing the owner of the title.

[60] In Sabah, alienation of land is governed by the Land Ordinance which is different from the Sarawak Land Code. The difference in the two Enactments is reflected in the observation of the learned judge who, after holding that the native title in that case could not be extinguished by alienation to a third party under s. 15 of the Sarawak Land Code without hearing the owner of the title, remarked that Sarawak should perhaps take a leaf from s. 13 of the Sabah Land Ordinance which provides that upon receipt of any application for unalienated country land, the Collector shall publish a notice calling upon any claimant to native customary right in such land.

[61] The issue was whether Sarawak's Order No. XXIX of 1921 had the effect of extinguishing the native customary rights over land falling within the Shell Concession Area which had been acquired or exercised prior to the 1921 Order, it was found that the effect of Order 1921

A was merely to reserve a specified area for the purpose of the operations of the Sarawak Oilfields Limited, but it did not extinguish the native customary rights over the land. Federal Court held that in the absence of such a provision in the 1921 Order, the Order could not be construed to have the effect of extinguishing the rights of the native
B over such land which had been in existence prior to the coming into force of the said Order. Such a drastic measure needs to be expressed in clear language and cannot be derived by mere implication.

[62] *Madelin*'s case involved substantive law whereas the issue in this case whether this court has original jurisdiction to determine the native
C customary rights of the plaintiffs in the light that such right is vested exclusively in the Collector.

[63] In the present case, the defendants do not challenge the rights which the plaintiffs claimed are the rights which exist at common law
D and that they are protected both by the Federal Constitution and by the Land Ordinance. What the defendants contend is that there is no automatic conferment of the native customary rights over the claimant of such rights; such rights are to be determined by Collector.

[64] Given that in Sabah there is an Enactment in the form of Land
E Ordinance (Cap. 68) 1930 which not only recognizes the existence of native customary rights but also gives wide definition of what constitutes native customary rights and which also lays down the procedures which are to be adopted when dealing with native land matters it is my opinion that there is no reason for the plaintiffs to resort to common law to
F establish their native customary rights in the Land.

[65] Plaintiffs also argued that the compulsory acquisition of the Land and the alienation of the Country Lease by the 4th defendant without compensation is unconstitutional and violates arts. 5, 8 and 13 of
G Federal Constitution.

[66] Article 5 of the Federal Constitution guarantees that no person shall be deprived of his life which includes the rights to livelihood except in accordance with law. Art. 8 guarantees equality before the law while art. 13 guarantees that that no person shall be deprived of his property
H without adequate compensation and save according to law.

[67] In my opinion, reliance on the Federal Constitution is misplaced for the reason that s. 16 of the Land Ordinance expressly provides that native customary rights which have been established shall be dealt with either by money compensation or by a grant of the land to the claimant.
I

[68] The reason why the plaintiffs have not received their compensation before the alienation of the Land to the 1st defendant was because they had failed to respond to the notice issued pursuant to s. 13 of the Ordinance. Be that as it may, given that the Collector under s. 16 of the Land Ordinance, has the discretion either to grant a title or to make money compensation to the successful native customary rights claimants, I fail to see why the Collector should not hold a hearing to determine whether the plaintiffs have native customary rights as claimed and if they can successfully establish their claims, to make monetary compensation *in lieu* of an issued title.

[69] The contention that the 4th and 5th defendants have breached their fiduciary duty towards the plaintiff is without merit. I say so because the 4tn and 5th defendants have duly followed procedures laid down in the Land Ordinance before alienating the Land to the first defendant.

[70] To conclude, I reiterate that in view of ss. 13, 14, 15, 16 and 40 of the Land Ordinance which expressly vests the jurisdiction in determining native customary rights to the Collector and excludes court jurisdiction except on appeal, the court has no jurisdiction to hear the present claim which calls upon the court to determine the native customary rights claimed by the plaintiffs. I further reiterate that even though the plaintiffs have failed to file their statement of claim of native customary rights pursuant to the s. 13 notice issued by the Collector, there is nothing to stop the Collector from hearing the plaintiffs' claim and in the event the plaintiffs successfully establish their native customary rights, the Collector can award compensation since the Land had already been alienated to the first defendant.

For all the above reasons, I allow the preliminary objection with costs to the defendants to be taxed unless agreed.